

No. 89-1444

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,
vs.

FIRST SECURITY BANK OF UTAH, N.A.,
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF VELMA RIFE JONES (DECEASED), ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wyoming

BRIEF OF RESPONDENTS ROCK SPRINGS GRAZING
ASSOCIATION, LAZY VD LAND AND LIVESTOCK,
ELZA EVERSOLE AND LOIS M. EVERSOLE IN
OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the decision of the Wyoming Supreme Court that a beneficiary of a testamentary trust is not a "beneficiary named in the Will" entitled to notice of the sale of assets of a decedent's estate under §2-7-205, Wyo. Stat. (1977) is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

RULE 29.1 STATEMENT

Respondent Rock Springs Grazing Association is a Wyoming corporation. It has no parent or subsidiary corporations.

RULE 29.4 STATEMENT

Since the proceeding draws into question the constitutionality of Wyo. Stat. § 2-7-205(b), an act of Wyoming affecting the public interest, and neither the attorney general of Wyoming nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
RULE 29.4 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	11
I. WYOMING'S STATUTORY PROBATE PRO- CEDURE CONFORMS TO THE REQUIRE- MENTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.	13
A. Under Wyoming law, Petitioner has no property interest in the specific property constituting the assets of the estate.	13
B. Even if the Petitioner has a property interest under Wyoming law, the testatrix limited the extent and nature of the interest.	15
C. To require the notice asserted by Petitioner would adversely affect the comprehensive statutory provisions of Wyoming concerning trusts and trustees and would disregard the special need recognized by this Court for consistency and predictability where land ti- tles are concerned.	17
II. PETITIONER DOES NOT PRESENT A SUB- STANTIAL FEDERAL QUESTION	21
A. Petitioner has raised its conflict of interest argument for the first time in this Court...	21

TABLE OF CONTENTS – Continued

Page

- B. Petitioner did not properly present the question of the constitutionality of Wyoming's statute to the Wyoming Supreme Court. ... 22

CONCLUSION 25

APPENDIX..... A1

TABLE OF AUTHORITIES

Page

CASES

Board of County Commissioners v. First National Bank, 368 P.2d 132 (Wyo. 1962).....	21, 22
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	13, 14, 18
Cook v. Elmore, 25 Wyo. 393, 171 P. 261 (1918)	14
Hammer v. Atchinson, 536 P.2d 151 (Wyo. 1975).....	16
Illinois v. Gates, 462 U.S. 213 (1983).....	21, 22, 24
In re Gilchrist's Estate, 50 Wyo. 153, 58 P.2d 431, rehearing denied, 60 P.2d 364 (1936).....	16
In re Potter's Estate, 396 P.2d 438 (Wyo. 1964)	14
Leo Sheep Co. v. United States, 440 U.S. 668 (1979) ..	4, 19
Loyd v. Loyd, 731 F.2d 393 (7th Cir. 1984)	17
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	22, 24
Matter of Estate of Deutsch, 644 P.2d 768 (Wyo. 1982).....	16
Matter of Estate of Jones, 770 P.2d 1100, rehearing denied, 782 P.2d 229 (1989).....	<i>passim</i>
Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).....	13, 15, 18
Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987).....	5
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	13, 15, 18, 21
Parratt v. Taylor, 451 U.S. 527 (1981).....	12

TABLE OF AUTHORITIES – Continued

Page

Ririe v. Board of Trustees of School District No. 1, 674 P.2d 214 (Wyo. 1983)	23
Street v. New York, 394 U.S. 576 (1969)	24
Tobin v. Pursel, 539 P.2d 361 (Wyo. 1972)	23
Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988)	13, 15, 17, 19

CONSTITUTIONAL PROVISION

U.S. Const. Amend. XIV	12, 17
------------------------------	--------

STATUTES

28 U.S.C. § 1257(a) (1982)	24
Wyo. Stat. § 2-1-102 (1977)	16
Wyo. Stat. § 2-7-205 (1977)	11, 23
Wyo. Stat. § 2-7-402 (1977)	14, 15
Wyo. Stat. § 2-7-615 (1977)	23
Wyo. Stat. § 4-8-101 (1977)	15, 17
Wyo. Stat. § 4-8-102 (1977)	15, 18
Wyo. Stat. § 4-8-103 (1977)	18
Wyo. Stat. § 4-8-105 (1977)	18, 22
Wyo. Stat. § 4-8-107 (1977)	20

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

G. Bogert, <i>Trusts and Trustees</i> (2nd ed. rev. 1982)	19
W. Calef, <i>Public Lands and Private Grazing</i> (Univ. of Chicago 1960)	6
C. Ragsdale, "Section 3 Rights Under the Taylor Grazing Act," IV Land & Water L. Rev. 399 (1969)	5
<i>Restatement (Second) of Trusts</i> (1959)	18, 19
Wyoming Rules of Appellate Procedure, Rule 5.07	23
Wyoming Rules of Civil Procedure, Rule 60(b)	10

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CERTIORARI TO THE SUPREME
COURT OF WYOMING

Respondents Rock Springs Grazing Association, Lazy
VD Land and Livestock, Elza Eversole and Lois M. Ever-
sole respectfully request that the Petition for a Writ of
Certiorari sought by Petitioner to review the judgment of
the Supreme Court of Wyoming entered on November 15,
1989, be denied.

OPINIONS BELOW

The opinion of the District Court of the Third Judicial District of the State of Wyoming, in and for the County of Sweetwater, from which Petitioner appealed to the Supreme Court of Wyoming is not officially reported, but is reproduced in Petitioner's Appendix C. The original opinion of the Supreme Court of Wyoming denying Petitioner's original appeal and affirming the decision of the District Court is reported at 770 P.2d 1100 and is reproduced in Petitioner's Appendix A. The Wyoming Supreme Court's opinion on rehearing, again denying Petitioner's appeal, is reported at 782 P.2d 229 and is reproduced in Petitioner's Appendix B.

STATEMENT OF CASE

Velma Rife Jones (hereinafter Mrs. Jones) died on October 19, 1986. (Petitioner's Appendix A2, hereinafter Pet. App. ___, R. 30¹). Her will was admitted to informal probate in Utah, her domicile at demise, and First Security Bank of Utah, N.A. (hereinafter First Security-Utah), named Executor in the will, was appointed Personal Representative of her estate in Utah. (R. 6-9.) Subsequently, the will was offered for ancillary probate in Wyoming by

¹ "R. ___" denotes references to the original record of the probate proceedings in the District Court of the Third Judicial District of the State of Wyoming, in and for the County of Sweetwater, as filed in the Supreme Court of Wyoming on appeal.

the joint petition of First Security-Utah and First Security Bank of Rock Springs (hereinafter First Security-RS). The will was admitted to probate and First Security-Utah and First Security-RS were appointed Co-Personal Representatives by the District Court in Wyoming (R. 1-31).

Mrs. Jones' will provided for specific pecuniary bequests to several cousins, if they survived her. (R. 13.) All the rest of her property was disposed of under Paragraph Fifth of the will, (R. 13) providing, in part:

The residue of the property owned by me at my death, real and personal and wherever situate, I give, devise and bequeath to First Security Bank of Utah, N.A. as my Trustee to be held as a separate trust on the following terms:

* * *

Following this language in the will are several pages of instructions concerning the trust and the powers and obligations of the trustee. (R. 13-24.)

The will provided (R. 13-14) that if Mrs. Jones' sister survived her, the trustee should pay income from the trust to the surviving sister during her lifetime. The same paragraph of the will (R. 16) goes on to provide that upon the death of the sister, the trustee, after the complete funding of the trust, shall distribute all of the principal and uncommitted income one-half to petitioner and one-half to the University of Utah, if such entities are at that time qualified as organizations under certain provisions of the Internal Revenue Code. If either or both of the named entities are not so qualified, appropriate contingent instructions are given. The trustee is given full

power to sell assets of the trust in its sole discretion. (R. 17-19.)

A large portion of the assets of the estate of Mrs. Jones was a ranching operation in southwest Wyoming known as the Rife Ranch.² That ranching operation consisted of real property in Sweetwater County, Wyoming, leases of state lands from the State of Wyoming, appurtenant federal grazing privileges on the public domain adjacent to and interspersed with the real property, and shares of stock in Rock Springs Grazing Association (hereinafter RSGA).³

² Some statements concerning the ranching operation in Petitioner's Petition are possibly misleading, probably as a result of Petitioner's limited experience concerning the nature and extent of ranching property interests in the area of Wyoming where the Rife Ranch is located. Specific instances of potentially misleading statements will be treated in subsequent footnotes.

³ Petitioner states in its Petition that Rife Ranch is an approximately 40,000 acre *parcel* (emphasis added) of fee and leased property (Petition, page 3, hereinafter Pet. ____). This might imply that an owner of the ranch has the exclusive use of some 40,000 contiguous acres of land. As pointed out by the appraiser of the Rife Ranch (R. 233, 254, 380), this is not the case. The fee lands of the Rife Ranch consist of approximately 25,000 acres of land. These lands are interspersed with other privately owned lands, federally owned lands and state owned lands. For the most part, they are unfenced and generally undiscernable from neighboring lands in terms of readily ascertainable boundaries. Most of the fee lands lie within an area known as the "checkerboard." See *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), for a description of the checkerboard about 100 miles east of the lands involved in this action and for a description of some of the problems inherent in such

(Continued on following page)

After Mrs. Jones' death, Ranchers Realty of Lander, Wyoming approached A. W. Dickinson⁴, a rancher engaged in livestock raising on lands in the vicinity of the Rife Ranch, to see if he might be interested in purchasing

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ownership. Cf. *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) for a description of checkerboard lands in the immediate vicinity and some of the other problems inherent in such ownership. The reference to leases is also somewhat misleading, inasmuch as the only leases in the traditional sense are those from the State of Wyoming, which are subject to considerable management constraints imposed by the State in the interest of relatively free public access. The federal permits are Section 3 permits and are subject to the management restrictions on such interests. See C. Ragsdale, "Section 3 Rights Under the Taylor Grazing Act," IV Land & Water L. Rev. 399 (1969). Finally, the shares in RSGA simply represent the right to graze defined numbers of livestock in common with other shareholders on RSGA ranges, subject to the management restrictions of RSGA and the Bureau of Land Management. All of the lands are used by many other entities under the general concept of multiple use, without much concern for actual record ownership. Thus, the so-called "parcel" is unfenced, is subject to the management dictates of at least three different entities, and the use thereof (including, as a practical matter, the fee lands) is non-exclusive and is shared with other livestock operators, hunters, recreationists, oil companies, wildlife, wild horses and myriad other users. These factors may have played some role in the appraiser's thoughts concerning the difficulties of management of the property and the pertinent considerations concerning value (R. 399-401). It may also explain, to some degree, the trustee's concerns regarding management, income production and the determination to sell. (R. 499-500).

⁴ Dickinson is a partner with his wife and children in Lazy VD Land & Livestock.

the ranch or portions of it. (R. 530.) Dickinson indicated interest, if he could find others to participate with him. (R. 530.) Dickinson approached Elza Eversole, another local rancher, and, later, Leonard W. Hay, Vice-President of RSGA,⁵ and ascertained that Eversole and RSGA would be interested in joining him in making an offer on the ranch. (R. 526-527, 530-531.) In early April, 1987, Ranchers Realty indicated to Dickinson, Eversole and RSGA that First Security-Utah might entertain an offer and invited them to make one. (R. 527, 532.) Dickinson, Eversole and RSGA created a joint venture styled Southern Wyoming Cattle Co. to make the offer, to take title to the property if the offer were accepted and to distribute the property among them according to their various requirements. (R. 527, 532.) On April 28, 1987, Southern Wyoming Cattle Co. made a written offer to First Security-Utah to purchase the ranch for cash, subject to the conditions stated in the offer. (R. 527, 532, 57, 62, 500, 488.)

⁵ RSGA owns lands within the checkerboard in Sweetwater County, Wyoming, leases lands within the checkerboard from the State of Wyoming, leases lands within the checkerboard from other private land owners and has grazing permits within the checkerboard from the Bureau of Land Management. A share of RSGA stock presently entitles the shareholder to graze 3500 sheep (or their livestock equivalent) within the Association's range during its stated grazing season of December 15 to May 1. The share is assessable by the corporation for various expenses. RSGA's lands are also unfenced and are interspersed with the lands of other private owners, those of the United States and those of the State of Wyoming. For a somewhat dated, but still relatively accurate, description of RSGA's operation, see W. Calef, *Public Lands and Private Grazing*, pp. 202-213 (Univ. of Chicago 1960).

Apparently, the trustee was concerned about the ability of the ranch to generate the income necessary for the benefit of the income beneficiary and about the difficulties of the trustee's administering the property as a reasonable investment.⁶ (R. 499-500.) In any event, First Security-Utah, after review of the offer and consultation with the appraiser⁷ which it had retained for purposes of

⁶ As the appraiser had indicated that the \$36,000, more or less, per annum being paid on the existing lease was market and that the expected market return was something between three and four per cent per annum, one might perhaps understand these concerns. (R. 394-396).

⁷ The appraiser had already brought to the attention of the trustee that there was a declining market for agricultural lands in southwest Wyoming. In the appraiser's view, the value was falling fairly rapidly. Justifiable comparables were hard to obtain and were becoming rapidly dated even when obtained. (R. 399-401) The upshot was that when the appraiser was informed of the cash offer in light of all the foregoing, the appraiser himself, who provided every value figure quoted in Petitioner's petition, thought the price offered was reasonable. (R. 492-493). Further, at various places in its Petition, petitioner insinuates some sort of impropriety in the trustee's having sold the lands with minerals and quotes the appraiser's report. (Pet. 5, n. 4; Pet. 10, n. 8.) An examination of R. 265-266 reveals that of the 25,000 or so acres of deeded lands, fewer than four thousand acres had mineral estate unsevered from the surface estate, that none of the deeded lands with unsevered minerals had any production and that

"Minerals in the general area have traditionally been sold all or in part with the surface rights, with no discernable value contribution except in those areas where exploration has shown a reasonable certainty of discovery. With the upsurge of oil and gas exploration in the area the past few years, there is

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appraising the assets of the estate (R. 500-501), accepted the offer, with minor modifications, on April 30, 1987, and on May 1, 1987, the modifications were accepted by Southern Wyoming Cattle Co. (R. 528, 532-533, 57-58, 63-93, 501, 490.)

The Personal Representatives obtained and filed Waivers of Notice of Hearing on Petition for Authority to Sell Real Property and for Confirmation of Sale from the various specific legatees of Mrs. Jones' will. First Security-Utah, as trustee, issued its own Waiver of Notice as the residuary beneficiary named in the will. (R. 47-53, 58, 94.) First Security-Utah advised Southern Wyoming Cattle Co. that a closing could be held on May 19, 1987. (R. 528, 533.)

On May 19, 1987, the Personal Representatives filed with the District Court their "Petition for Authority to Sell Real Property and for Confirmation of Sale" (R. 54-93), which recited (R. 57-58), *inter alia*, that the Rife Ranch was not being operated and that the petitioners believed that it was in the best interests of the estate and of its beneficiaries that the ranch be sold, for the reasons that the estate was in need of liquid assets to pay the

(Continued from previous page)

currently a trend for owner/sellers to reserve unto themselves the mineral rights. However, there is no concrete evidence in the market that the absence of mineral rights has an effect on the selling price of a property."

In other words, the minerals value was *de minimus*. The purchasers' written offer included minerals. (R. 99).

debts, specific bequests, costs of administration and taxes of the estate⁸ and for the further reason that

the ultimate beneficiary of the estate (a trust for the benefit of Darrell Rife Mork, the sister of Velma Rife Jones during her lifetime and then after her death two charities) has no desire to own or operate the Rife Ranch.

(Pet. App. A3, R. 57.)⁹ The petition also indicated that there had been filed in the estate Waiver of Notice of Hearing by the beneficiaries of the estate, and that therefore no additional notice of the hearing needed to be given.

On that same date, the District Court entered its "Order Approving Sale of Real Property and Confirmation of Sale," (R. 94-130) which stated: "... waivers of notice of the said filing have been filed herein by those

⁸ Petitioner suggests in n. 7 of its Petition that \$108,940 in liquid assets would be available. Petitioner's arithmetic fails to consider the necessities of the income beneficiary, the costs of administration of the trust or the costs of simply maintaining the Rife Ranch. Further, while the trustee was not required to generate a 9% income return for the income beneficiary, it appears to be the intent of the testatrix that the trustee was to aim for such return. (R. 13-15.) An asset which would produce 3% - 4% return and is the major asset of the trust would appear to adversely affect the available income of the trust and the amount available to the income beneficiary.

⁹ Petitioner suggests in its Petition (Pet. 6) that this language somehow suggested to the Court that Petitioner had no desire to own or operate the Rife Ranch. It seems quite clear, in the context of the will, the language of the petition and the fact that the trustee waived notice, that it was the trustee, the beneficiary named in the will, which did not desire to own or operate the Rife Ranch.

persons interested in the said Estate and entitled to notice by statute; . . . " (R. 94) and which ordered and decreed that notice of the matter need not be given, that the Petition for Authority to Sell was approved and allowed and that the sale to Southern Wyoming Cattle Co., pursuant to the terms and conditions of the offer, was confirmed. (R. 97.)

On the same day, a deed conveying the Rife Ranch was executed and delivered by the Personal Representatives to Southern Wyoming Cattle Co. (R. 528, 533.) Southern Wyoming Cattle Co. then delivered its deeds conveying the real property to its various joint venturers (or their nominees) in accordance with their own agreement. (R. 528, 533.) Later that day, all the deeds were recorded. The various grantees went into possession and took the necessary actions to cause the transfer of state leases, federal grazing permits and RSGA shares and caused notification of the change of ownership to be given to various owners of interests in the real property affected by the change. (R. 528-529, 533-534.)

About two months later, Petitioner filed its Motion pursuant to Rule 60(b), Wyoming Rules of Civil Procedure, seeking to have the District Court vacate its Order approving and confirming the sale and to nullify the sale. (R. 131.) The District Court issued its opinion letter denying the Motion (Pet. App. C, R. 596-601) and an Order Denying the Appellant's Motion for Relief under Rule 60(b) was entered by the Court. (R. 915.) Petitioner Appealed from that Order to the Supreme Court of Wyoming. (R. 919.) The Supreme Court of Wyoming affirmed the decision of the District Court in a 3-2 decision issued on March 21, 1989, ruling that Petitioner was not "a

beneficiary named in the will" as contemplated by § 2-7-205, Wyo. Stat. (1977), that First Security-Utah, as trustee, was the "beneficiary named in the will" as contemplated by such statute, and that Petitioner was not entitled to notice of the sale. (Pet. App. A.) Subsequently, on November 15, 1989, the Wyoming Supreme Court modified its earlier opinion, noting that it was not necessary to categorize Petitioner as a "contingent" beneficiary in order to reach its earlier decision. (Pet. App. B.) It ruled that its earlier decision should be

confirmed insofar as it is expressed in the essence of the ratio decidendi: "The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a 'beneficiary named in the will.' " *Matter of Estate of Jones*, 770 P.2d at 1103.

(Pet. App. B2.) Chief Justice Cardine, author of a dissenting opinion in the first decision, signed the second opinion for the Court.

REASONS FOR DENYING THE PETITION

Briefly stated, this is a case in which the trustee of a testamentary trust, having been granted in the will creating the trust full and exclusive discretionary power to sell any or all of the assets of the trust, consented to a sale by the personal representatives of the decedent's estate of certain of the assets of the estate to a *bona fide* purchaser. Notwithstanding the intentions of the testatrix as expressed in the powers granted the trustee in the will,

notwithstanding the powers of the trustee under the general statutory law of Wyoming, notwithstanding the nature of the interests of a beneficiary of a trust and notwithstanding the equities of a *bona fide* purchaser, Petitioner asserts that it has an absolute right under the Due Process Clause of the Fourteenth Amendment of the United States Constitution which overcomes them all.

Petitioner has confused the issue in this case from its outset. Throughout the proceedings, Petitioner has failed to adequately address important considerations necessary to its due process argument. The elements of that argument are that (1) a state take action, (2) which deprives someone of his property, (3) without due process. See *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). Petitioner's case fails this test.

Petitioner has never shown, and no Court has ever found, that it has a property interest in the specific property which comprised the assets of the estate of Mrs. Jones. Even if there were such an interest, Petitioner does not show the requisite state action necessary to its due process argument.

Further, to require a trustee to notify all beneficiaries of each management decision which the trustee makes with respect to the property of the trust would frustrate the very nature of the comprehensive statutory provisions of Wyoming concerning trusts and trustees and would go far beyond the requirements which this Court has heretofore established. It would adversely affect the reasonable expectations of *bona fide* purchasers and would disregard the special need recognized by this

Court for continuity and predictability where land titles are concerned.

Finally, there really is no substantial federal question presented in this case. The Wyoming Supreme Court simply interpreted its own State statute to determine the parties who have an interest in a probate proceeding and thereby who has the right to notice of activities within that process. If there is a constitutional deficiency in the Wyoming statutory scheme, Petitioner has never properly presented the question to the Wyoming Supreme Court for its determination.

I. WYOMING'S STATUTORY PROBATE PROCEDURE CONFORMS TO THE REQUIREMENTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Under Wyoming law, Petitioner has no property interest in the specific property constituting the assets of the estate.

The United States Constitution does not create property rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such cases as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) illustrate that the Constitution will protect rights which are created from improper extinguishment by requiring that due process be observed. However, the interest protected must be created from some source other than the United States Constitution. Such interests are "... created and their dimensions defined by existing

rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Roth, id.* Further, for an interest to be created, and thereby protected, the person asserting the interest must show something more than an abstract need or desire for it and more than a unilateral expectation of it. He must show a legitimate claim of entitlement to it. *Id.*

Throughout these proceedings, Petitioner has asserted that it has a vested interest in the very assets of the estate itself. However, a review of the law of Wyoming makes it clear that it had no legitimate claim of entitlement to the specific property present in the estate.

Under Wyoming law, where there is a will, title to a decedent's property "passes to the person to whom it is devised by his last will" § 2-7-402, Wyo. Stat. (1977). (Pet. App. A7) This has long been the law of Wyoming. *Cf. Cook v. Elmore*, 25 Wyo. 393, 404, 171 P. 261, 264 (1918). Further, the only parties interested in the estate in Wyoming are the executor, administrator, spouse, next of kin, heirs, legatees, devisees, and creditors of the deceased or of the administration. *In re Potter's Estate*, 396 P.2d 438, 447 (Wyo. 1964). (Pet. App. A6) In the instant case, a review of Mrs. Jones' will reveals that the general legatee and only devisee under the will is First Security-Utah, as trustee. The property in question passed to the trustee, First Security-Utah, on October 19, 1986, the date of demise of Velma Rife Jones, subject to administration

of the estate as provided by § 2-7-402, *supra*. On that date, in the absence of a prohibition in the instrument creating the trust, the trustee had the discretionary power to sell the property in question, subject only to the administration of the estate. §§ 4-8-102, 4-8-101(a)(iii), 2-7-402, Wyo. Stat. (1977).

Petitioner argues that under the holdings of *Mullane*, *Mennonite Board of Missions* and *Tulsa Professional Collection Services, Inc.*, it was entitled to notice. In each of those cases, the party entitled to notice had some entitlement, a property interest, which was destroyed by the action taken. In *Mullane*, it was the right to challenge the trustee's accounting. That existing right would be gone forever after the court's action. In *Mennonite*, the mortgagee in question lost its right to redeem. That existing right would be gone forever after the challenged action. In *Tulsa*, the creditor lost its right to file a claim and enforce its right against the decedent in the decedent's estate. That existing right was extinguished forever. In each instance, there was an existing right – an expectation, a property interest – created by the state, which would be lost forever without action. Here, the expectation asserted by Petitioner is the right to take the property in kind (Pet. 12, n.10). Under the law of Wyoming, Petitioner had no legitimate claim of entitlement. Its expectation was unilateral, at best. Petitioner lost nothing and *Mullane*, *Mennonite* and *Tulsa* simply do not apply.

B. Even if the Petitioner has a property interest under Wyoming law, the testatrix limited the extent and nature of the interest.

As in most states, Wyoming law requires its Courts sitting in probate to give effect to the intentions of a

testator as expressed in the will. § 2-1-102(ii), Wyo. Stat. (1977). See also, e.g., such cases as *Matter of Estate of Deutsch*, 644 P.2d 768 (Wyo. 1982), *Hammer v. Atchinson*, 536 P.2d 151 (Wyo. 1975) and *In re Gilchrist's Estate*, 50 Wyo. 153, 58 P.2d 431, *rehearing denied*, 60 P.2d 364 (1936). Here, the intent is fairly easy to glean. Mrs. Jones intended that any interest which Petitioner might have was to be subject to the absolute right of the trustee to sell the assets of the trust.

Under the powers granted to the trustee under the will, which defined the dimensions of the interest, the trustee had absolute power on the date of Mrs. Jones' death, as the trustee and owner of the property, subject only to administration of the estate, to sell the property in its absolute discretion. (R. 17-19.) The Petitioner had no present vested interest in the property which was the subject of the sale, i.e. the assets of the estate itself. The trust provisions provided that Petitioner only took a share of the principal and income of the trust upon the death of the income beneficiary of the trust, subject to conditions to be determined at such time. Even if Petitioner met the conditions, its only right was to the trust assets then existing after the complete funding of the trust. (R. 16.) The interest which Petitioner has, of whatever nature, is not an interest in the property of the estate, but is an interest in the trust created by the will. To find otherwise would be contrary to the intent of the testatrix, for Mrs. Jones gave the absolute discretionary power to sell the trust assets to the trustee. If the trustee is restricted as to sale discretion and has to consult the beneficiaries of the trust on each decision, the intent of the testatrix is being thwarted. And it is her intent which

creates – which defines – the dimensions of the right created.

Thus, it is not the action of the State of Wyoming which restricts Petitioner's right to notice. It is the very act of the testatrix herself. Her action is not State action. Cf. *Loyd v. Loyd*, 731 F.2d 393, at 398-99 (7th Cir. 1984). Both from the point of view of the interest created and of state action, Petitioner has failed to bring itself within the parameters of the Fourteenth Amendment. As this Court discussed in *Tulsa*, *supra* at 485-487, there has to be state action. Further, as there indicated, to constitute state action, the state must do more than be merely passive, must do more than merely make available to a private party for private use certain proceedings. *Id.* In this instance, where a private party created the dimensions of the interest, there simply is no State action.

- C. To require the notice asserted by Petitioner would adversely affect the comprehensive statutory provisions of Wyoming concerning trusts and trustees and would disregard the special need recognized by this Court for consistency and predictability where land titles are concerned.

The Wyoming legislature has enacted comprehensive statutory provisions concerning fiduciaries such as trustees in the Uniform Trustees Powers Act, §§ 4-8-101, *et seq.*, Wyo. Stat. (1977) (set out in part in Appendix hereto). In that act, Wyoming has provided that trustees in Wyoming shall have certain duties and powers. Among the powers granted by the legislature to trustees is the power to sell the assets of the trust without having to

seek court or beneficiary approval, unless the instrument creating the trust specifically prohibits such discretionary sales.¹⁰ §§ 4-8-102(a), 4-8-103(a), 4-8-103(c)(vii), Wyo. Stat. (1977). By creating such a power in the trustee, the Wyoming legislature necessarily limited the nature of the beneficiary's interest.

Respondents have earlier discussed the requirements concerning the source of protected interests set down by this Court in the *Roth* decision at pp. 13-14, *supra*. Wyoming, as part of its statutory treatment of trusts and trustees, has defined the extent of the interest which a beneficiary has in a trust, just as Wisconsin defined by statutory terms the interest of school teachers such as Roth. Obviously, the interest of a beneficiary in Wyoming is not to any specific asset of the trust, in as much as that specific piece of property can be sold at the discretion of the trustee. This is not surprising in light of the general law of trusts. See generally *Restatement (Second) of Trusts* (1959), §§ 88(1), 187, 190, 202(2), 272, 277. However, what is important is that the laws of Wyoming, which are the source of Petitioner's interest of whatever nature, have limited the extent of Petitioner's interest, in the absence of a contrary instruction from the person creating the trust. This is the State's prerogative, recognized by this Court. *Roth*, *supra* at 577.

This is not a situation like *Mullane*, where the legislature created a situation in which the existing right of the beneficiary, that of challenging an accounting, was destroyed forever without notice that the right was in jeopardy. It is not a situation like *Mennonite*, where the action

¹⁰ § 4-8-105(b), Wyo. Stat. (1977) provides an exception in the event of conflict of interest as there defined. Petitioner has never invoked this provision. See text, *infra* at 21-22.

of the state destroyed a right by providing for a procedure which did not give the owner of the right notice to allow it to exercise the only right it had, that of redemption. It is not a situation like *Tulsa*, where the only right of the creditor, that of filing a claim in the decedent's estate – a proceeding at least in part created for his benefit – was destroyed without any reasonable notice. In all of those cases, it was clear that the aggrieved party had a legitimate claim of entitlement to the interest being extinguished. Here, there is no such legitimate claim. The very source of Petitioner's interest defined the limitations of that interest. To require anything further would be to expand the right created and to improperly interfere with the state's right to define property interests.

Further, this Court has indicated that it has traditionally recognized the special need for certainty and predictability where land titles are concerned. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979). It is clear under the general law of trusts that where a trustee has an absolute power of sale and sells to a *bona fide* purchaser, all equitable interests are cut off and extinguished. See G. Bogert, *Trusts and Trustees*, § 881; *Restatement (Second) of Trusts*, §§ 283, 284. If the grantee is a *bona fide* purchaser, he takes free of any interest of the beneficiaries, and the beneficiaries are left to their remedy against the trustee for breach of the trust.¹¹ As part of its

¹¹ Conversely, if the purchaser is not *bona fide*, it follows that a frustrated beneficiary can pursue both the trustee and the purchaser. See *Restatement (Second) of Trusts*, §§ 288, 289, 290, 291. Petitioner suggests "Perhaps the sale of the Rife Ranch was part of a scheme to benefit the purchasers and to

comprehensive statutory enactment, Wyoming has followed this general rule. It has provided that a person dealing with a trustee has the right to presume that the trustee is acting within his powers and that he has the power to act, unless the person has actual knowledge to the contrary. § 4-8-107, Wyo. Stat. (1977). In the instant case, the equities are even stronger. The instrument creating the trust was a public record. The instrument did not withdraw the statutory power of the trustee to sell. In fact, the instrument specifically granted such power to the trustee in its sole discretion. The public record further indicated that the very person with the power to sell had consented to a sale from the estate. If this Court now determines that a trustee with such power, whether granted by statute or by the instrument itself, cannot sell assets of the trust without giving notice to all the beneficiaries of the trust, it seems clear that this Court will not only have created a new right where none now exists, but will make it necessary for every prospective purchaser in every sale by a trustee to demand that every beneficiary

(Continued from previous page)

hoodwink the Petitioner." (Pet. 23) If such is the case, then perhaps Petitioner ought to prove its innuendō in a proper Wyoming state court and show that the purchasers are not *bona fide* under § 4-8-107, Wyo. Stat. (1977). Petitioner has made much of its lack of remedy in this case. As was pointed out by the District Court in its opinion, "... perhaps Shriners' best remedy is to sue the bank for damages." (Pet. App. C5). If the purchaser respondents are not *bona fide* purchasers, they should be included. And, indeed, Petitioner has filed such an action. *Shriners' Hospital for Crippled Children v. First Security Bank of Utah, N.A., et al.*, Civil Action No. C-89-247, District Court of the Third Judicial District of Wyoming, in and for the County of Sweetwater.

be notified of the sale. This assumes, of course, that such a purchaser can be found after the creation of such a rule. In effect, this Court will be saying that there can never be a *bona fide* purchaser in a trustee's sale. In effect, this Court will be saying that every beneficiary of a trust has an interest in the specific property constituting that trust and that a purchaser buys any portion of such property at his peril. A prospective purchaser will no longer be able to depend upon the terms of the trust instrument, much less the statutory law of his state. Cf. *Board of County Commissioners v. First National Bank*, 368 P.2d 132, 138-140 (Wyo. 1962).

II. PETITIONER DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. Petitioner has raised its conflict of interest argument for the first time in this Court.

Petitioner has raised the question of a conflict of interest by the trustee for the first time in this Court. The conflict question was simply not raised below, either as a basis for assertion of a due process violation or as a basis for any other claim. This Court will not hear questions raised before it for the first time, or stated differently, it will not hear cases presenting entirely new claims. *Illinois v. Gates*, 462 U.S. 213, 217-220 (1983). Here, it is not merely an enlargement of a question presented below, which *Gates* suggests may be an exception. It is an entirely new question. Petitioner suggests that because of the outrageous conflict of the trustee, the Wyoming Supreme Court's decision is so completely contrary to *Mullane* that this Court should summarily reverse the judgment. (Pet. 22, n. 15). This is simply not true. Wyoming statutory law

provides a definition of conflict of interest in such circumstances. § 4-8-105(b), Wyo. Stat. (1977). Wyoming has enacted legislation to establish uniform and definite rules to govern dealings with and breaches by fiduciaries. Cf. *Board of County Commissioners v. First National Bank*, 368 P.2d 132, 136-137 (Wyo. 1962). The conflict question was never presented below, and no state court in Wyoming has ever had an opportunity to rule on such a question. This Court has indicated that it is not inclined to make constitutional decisions where the lower courts have not had the question properly placed before them. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940). Cf. *Illinois v. Gates, Id.* This Court should decline to issue its Writ of Certiorari.

B. Petitioner did not properly present the question of the constitutionality of Wyoming's statute to the Wyoming Supreme Court.

In the Wyoming Supreme Court, Petitioner never suggested that the applicable provisions of the Wyoming statutes with which it was concerned were unconstitutional as such. The Wyoming Supreme Court never addressed the issue of the constitutionality of its probate statute concerning notice to be given to "beneficiaries named in the will." The only reference to the question of due process was made in passing by Chief Justice Cardine in his dissent from the first decision of that Court. (Pet. App. A9). In that dissent, he makes clear that he considered Petitioner a beneficiary named in the will. As such, petitioner was entitled to notice, both as a matter of state and federal law. (Pet. App. A9-A10). However, in the second opinion of the Wyoming Supreme Court, Chief Justice Cardine, writing for the Court, makes

no reference to the Due Process question, but simply states:

The crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for the purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a "beneficiary under the will."

(Pet. App. B3).

For the Wyoming Supreme Court to have addressed the question of the constitutionality of its statute under the circumstances of this case would be extremely unusual. Rule 5.07, Wyoming Rules of Appellate Procedure, clearly provides:

In all cases both criminal and civil . . . in which a statute, . . . is alleged to be unconstitutional, . . . counsel shall also serve a copy of their brief upon the attorney general.

In *Ririe v. Board of Trustees of School District No. 1*, 674 P.2d 214, 219 (Wyo. 1983), the Wyoming Supreme Court, quoting *Tobin v. Pursel*, 539 P.2d 361 (Wyo. 1972), stated the obvious reason for such a rule:

The attorney general, being the chief legal officer of the State, has a duty to protect the interests and the welfare of the people in declaratory judgment actions where statutory constitutional questions are in issue. 539 P.2d at 365.

Failure to comply with the rule can render an appeal of whatever nature vulnerable to dismissal for lack of jurisdiction. *Ririe, supra* at 220. In this instance, although

invited,¹² Petitioner did not serve the attorney general as required, and it must be assumed that such is a basis for the Court's silence on the constitutional issue.

Petitioner has invoked 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction in this matter. In exercising its jurisdiction under that section, the Court has held that it has no jurisdiction over such issues unless a federal question has been properly presented or determined in the court below. *McGoldrick, Id. Cf. Illinois v. Gates, Id.* Whether it is a question of jurisdiction as illustrated by *McGoldrick* or merely one of prudential restriction as suggested by *Gates*, this case is one in which this Court should decline to issue its writ of certiorari. This Court has stated that:

... when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. . . .

Street v. New York, 394 U.S. 576, 582 (1969). While in *Street*, it was determined that the appellant had affirmatively established the contrary, such is not the case here. In the instant case, petitioner failed to properly present the constitutionality issue to the Wyoming Supreme Court and has failed to affirmatively show that it was so considered. Accordingly, this Court should decline to grant a writ of certiorari for lack of jurisdiction.

¹² Briefs for Respondents suggested this deficiency to Petitioner. Petitioner chose not to serve the attorney general. *Cf. Ririe, supra* at 220.

CONCLUSION

For the reasons stated, Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

TITLE 2. Wills, Decedents' Estates and Probate Code

CHAPTER 1. General Provisions

ARTICLE 1. Citation and Construction

§ 2-1-102. Rules of construction and applicability.

(a) This code shall be liberally construed and applied, to promote the following purposes and policies to:

(i) Simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(ii) Discover and make effective the intent of a decedent in distribution of his property;

(iii) Promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(iv) Facilitate use and enforcement of certain trusts.

(b) Unless displaced by the particular provision of this code, the principles of law and equity supplement the code provisions.

(c) This code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

(d) The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of this code. It shall also govern further procedure in proceedings in probate then pending unless the court

determines its application in particular proceedings or parts thereof is not feasible or will work an injustice, in which event the former procedure shall apply.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
 CHAPTER 7. Administration of Estates
 ARTICLE 2. Notices

§ 2-7-205. Parties entitled to receive.

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper; and

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper.

(b) Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-615, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case

may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(c) Notice of all intended sales of real property not requiring an order of the court shall be mailed or delivered not less than ten (10) days prior to the sale to the surviving spouse, if any, and to the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(Laws 1979, ch. 142, § 1; 1980 ch. 54, § 1; 1989, ch. 114, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code

CHAPTER 7. Administration of Estates

ARTICLE 4. Marshalling Assets

§ 2-7-402. Title to decedent's property; subject to administration and payment of debts; priorities.

Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, and his property, except homestead and other exempt property, is chargeable with the payment of debts and charges against his estate. There is no priority between real and personal property,

except as provided in this code or by the will of the decedent.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1)

TITLE 4. Fiduciaries

CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-101. Definitions.

(a) As used in this act [§§ 4-8-101 to 4-8-110]:

(i) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;

(ii) "Trustee" means an original, added or successor trustee;

(iii) "Prudent man" means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence,

diligence, discretion, and judgment would act in the management of their own affairs.

(Laws 1965, ch. 54, § 1.)

TITLE 4. Fiduciaries

CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-102. Powers conferred on trustee by sections 4-8-101 to 4-8-110 and limitation thereon; incorporation of parts of sections 4-8-101 to 4-8-110 in instrument which is not a trust.

(a) The trustee has all powers conferred upon him by the provisions of this act [§§ 4-8-101 to 4-8-110] unless limited in the trust instrument.

(b) An instrument which is not a trust within the meaning of section 1(1) [§ 4-8-101(a)(i)] may incorporate any part of this act by reference.

(Laws 1965, ch. 54, § 2.)

TITLE 4. Fiduciaries

CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-103. Powers and duties generally of trustee.

(a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of his powers including the powers granted by this act [§§ 4-8-101 to 4-8-110], a trustee has a duty to act with due regard to his obligation as a fiduciary including a duty not to exercise any power under this act in such a way as to deprive the trust of an otherwise available tax exemption, deduction or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. "Tax" includes, but is not limited to federal, state or local income, gift, estate or inheritance tax.

(c) A trustee has the power, subject to subsections (a) and (b):

(i) To collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(ii) To receive additions to the assets of the trust;

(iii) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;

(iv) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(v) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(vi) To deposit trust funds in a bank, including a bank operated by the trustee;

(vii) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(viii) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(ix) To subdivide, develop or dedicate land to public use; or to make or obtain the vacation of plots and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(x) To enter into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust for any purpose;

(xi) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(xii) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(xiii) To vote a security, in person or by general or limited proxy;

(xiv) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(xv) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprises;

(xvi) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery; the trustee is liable for any act of the nominee in connection with the stock so held;

(xvii) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(xviii) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(xix) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(xx) To pay taxes, assessments, compensation of the trustee and other expenses incurred in the collection, care, administration and protection of the trust;

(xxi) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence,

amortization or for depletion in mineral or timber properties;

(xxii) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(xxiii) To effect distribution of property and money in dividend or undivided interests and to adjust resulting differences in valuation;

(xxiv) To employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(xxv) To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(xxvi) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

(Laws 1965, ch. 54, § 3.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-105. Effect of sections 4-8-101 to 4-8-110 on power of court; when court authorization required of trustee.

(a) This act [§§ 4-8-101 to 4-8-110] does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this act.

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization (except as provided in subsections (1), (4), (6), (18) and (24) of section 3(c) [§ 4-8-103(c)(i), (iv), (vi), (xviii) and (xxiv)]) upon petition of the trustee. For purposes of this section, in the case of a corporate trustee personal profit or advantage to an affiliated or subsidiary company or association is personal profit to the trustee.

(Laws 1965, ch. 54, § 5.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-107. Existence of trust powers and proper exercise thereof assumable by third persons; exception.

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the

existence of trust powers and their exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power, and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

(Laws 1965, ch. 54 § 7.)
